Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(f)-2–01 OF 2018 (W) AND 02(f)-3–01 OF 2018(W)
AHMAD MAAROP CJ (MALAYA), ZAINUN ALI, RAMLY ALI, BALIA YUSOF, ZAWAWI SALLEH FCJJ
1 AUGUST 2019

Building and Construction Law — Construction contracts — Adjudication — Appeal against Court of Appeal's decision in affirming High Court's decision — Whether adjudicator acted in excess of jurisdiction — Whether Construction Industry Payment and Adjudication Act 2012 ('the CIPAA 2012') applied to both interim and final claims — Whether dispute ought to have been arbitrated instead of adjudicated under the CIPAA 2012

The appellant was a private limited company carrying on business in property investment, while the respondent was a private limited company providing architectural consultancy services. The appellant engaged the respondent as a project architect for a multi-storey development project vide a letter of appointment ('the construction contract'). Later, the appellant terminated the respondent's service under the construction contract and the respondent accepted the termination. A dispute arose as to the amount of the professional fees for works done under the construction contract. The respondent took refuge under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA 2012') to recover its fees. The adjudicator awarded to the respondent the payment in the sum of RM258,550 being the balance amount of the total entitlement of RM631,228 less the amount paid of RM372,678. The appellant appealed to the High Court to set aside the adjudicator's determination while the respondent applied to the High Court to enforce the adjudicator's determination. The learned High Court judge dismissed the appellant's application and allowed the respondent's application. The appellant filed appeals to the Court of Appeal against the decision but the Court of Appeal had, by a majority judgment, dismissed the appeal and affirmed the High Court's decision. Hence, this appeal.

Held, dismissing the appeals and affirming the decision of the High Court and the Court of Appeal:

(1) Clause 6 of the construction contract expressly contemplated payment being made after the contract had been terminated as it set out the mechanism for the parties to value works done up to the date of determination. That cl 6 of the construction contract equated the rights

and liabilities of the parties to the general law of contract situation where the parties' past rights and obligations prior to the termination were not affected by the termination and therefore the appellant was not relieved from its obligation to pay the respondent. The right to payment under cl 6 of the construction contract survived the termination. The respondent had carried out works prior to the termination and the past rights and obligations of the appellant were not discharged due to termination. The respondent was entitled to the payment for works done as per the schedule stated in cl 3 of the construction contract (see paras 16–18).

(2) As long as they were payment claims relating to a construction contract defined in s 4 of the CIPAA 2012, the CIPAA 2012 would apply. There was no conceivable basis and/or logical reason that the Parliament would have intended a different approach between interim and final payments. The interpretation expounded by the majority of the Court of Appeal was consistent with the purpose and structure of the adjudication process outlined in the CIPAA 2012. It was clear from the Preamble, the Explanatory Notes to the Bill and the speech of the Deputy Minister when tabling the CIPAA Bill that the primary objective of the CIPAA 2012 was to alleviate cash flow issues by providing an effective and economical mechanism. There was no rhyme or reason to confine the applicability of the CIPAA 2012 to 'interim claim' only. The CIPAA 2012 did not mention the words 'interim claim' or 'final claim'. Section 36 of the CIPAA 2012 a fall-back section when there was no agreed contractual provision as to payment or when payment terms were inadequate or unworkable. Relying on s 36 of the CIPAA 2012 alone in interpreting the intention of the CIPAA 2012 would amount to a narrow interpretation and had no legal basis. The appellant's challenge on the jurisdiction of the adjudicator to adjudicate the matter was bereft of merit and, therefore, must fail (see paras 38–39, 55–56 & 71–72).

(3) There was nothing to stop the CIPAA 2012 from applying to the case at hand and there was no need to see adjudication and arbitration to be mutually exclusive to each other. Further, s 37 of the CIPAA 2012 provided that an adjudication proceeding, arbitration and court litigation may proceed concurrently and in parallel. It was also apparent that a mandatory procedure under the CIPAA 2012 and the right to a statutory adjudication should not be circumvented by any contract where parties had agreed to arbitrate (see paras 76 & 78).

[Bahasa Malaysia summary

Perayu adalah syarikat sendirian berhad yang menjalankan perniagaan pelaburan harta tanah, manakala responden adalah syarikat sendirian berhad yang menyediakan perkhidmatan perundingan arkitek. Perayu melantik responden sebagai arkitek projek untuk projek pembangunan bertingkat

dengan surat lantikan ('kontrak pembinaan'). Kemudian, perayu menamatkan perkhidmatan responden di bawah kontrak pembinaan dan responden menerima penamatan tersebut. Pertikaian timbul mengenai jumlah bayaran profesional untuk kerja yang dilakukan di bawah kontrak pembinaan. Responden berlindung di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP 2012') untuk mendapatkan kembali bayarannya. Adjudikator memberikan award kepada responden pembayaran berjumlah RM258,550 sebagai jumlah baki dari jumlah kelayakan sebanyak RM631,228 ditolak jumlah yang dibayar sebanyak RM372,678. Perayu merayu ke Mahkamah Tinggi untuk mengetepikan ketetapan adjudikator sementara responden memohon ke Mahkamah Tinggi untuk menguatkuasakan ketetapan adjudikator. Hakim Mahkamah Tinggi yang bijaksana menolak permohonan perayu dan membenarkan permohonan responden. Perayu memfailkan rayuan ke Mahkamah Rayuan terhadap keputusan tersebut tetapi Mahkamah Rayuan telah, dengan keputusan majoriti, menolak rayuan tersebut dan mengesahkan keputusan Mahkamah Tinggi. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi dan Mahkamah Rayuan:

(1) Klausa 6 kontrak pembinaan dengan jelas mempertimbangkan pembayaran dilakukan setelah kontrak ditamatkan kerana menetapkan mekanisme bagi pihak-pihak untuk menilai pekerjaan yang dilakukan hingga tarikh penentuan. Klausa 6 kontrak pembinaan menyamakan hak dan liabiliti pihak-pihak dengan undang-undang umum situasi kontrak di mana hak dan kewajiban pihak-pihak yang lalu sebelum penamatan tidak dipengaruhi oleh penamatan dan oleh itu perayu tidak dibebaskan dari kewajibannya untuk membayar responden. Hak untuk pembayaran di bawah klausa 6 kontrak pembinaan terselamat daripada penamatan. Responden telah melakukan kerja sebelum penamatan dan hak dan kewajiban perayu yang lalu tidak dibebaskan kerana penamatan. Responden berhak mendapat pembayaran untuk kerja yang dilakukan mengikut jadual yang dinyatakan di klausa 3 kontrak pembinaan (lihat perenggan 16–18).

(2) Selagi ia adalah tuntutan pembayaran yang berkaitan dengan kontrak pembinaan yang ditentukan dalam s 4 APAIP 2012, APAIP 2012 akan terpakai. Tidak ada dasar dan/atau alasan yang masuk akal bahawa Parlimen akan menginginkan pendekatan yang berbeza antara pembayaran interim dan akhir. Tafsiran yang dijelaskan oleh majoriti Mahkamah Rayuan selaras dengan tujuan dan struktur proses adjudikasi yang digariskan dalam APAIP 2012. Ini jelas dari Mukadimah, Nota Penjelasan Rang Undang-Undang dan ucapan Timbalan Menteri ketika membentangkan Rang Undang-Undang APAIP bahawa objektif utama APAIP 2012 adalah untuk mengurangkan masalah aliran tunai dengan menyediakan mekanisme yang efektif dan ekonomik. Tidak ada sebab

atau alasan untuk membatasi penggunaan APAIP 2012 hanya untuk 'tuntutan interim'. APAIP 2012 tidak menyebut perkataan 'tuntutan interim' atau 'tuntutan akhir'. Seksyen 36 APAIP 2012 adalah seksyen pengganti apabila tiada peruntukan kontrak yang dipersetujui mengenai pembayaran atau ketika terma pembayaran tidak mencukupi atau tidak dapat dilaksanakan. Bergantung kepada s 36 APAIP 2012 sahaja dalam menafsirkan hasrat APAIP 2012 akan menjadi tafsiran yang sempit dan tidak mempunyai asas undang-undang. Bantahan perayu mengenai bidang kuasa adjudikator untuk mengadili perkara itu adalah tidak bermerit dan, oleh itu, harus gagal (lihat perenggan 38–39, 55–56 & 71–72).

(3) Tiada yang dapat menghentikan APAIP 2012 untuk mengadili kes ini dan tidak perlu melihat adjudikasi dan timbang tara saling eksklusif antara satu sama lain. Selanjutnya, s 37 APAIP 2012 menetapkan bahawa prosiding adjudikasi, timbang tara dan litigasi mahkamah dapat berjalan bersama dan selari. Juga jelas bahawa prosedur wajib di bawah APAIP 2012 dan hak untuk adjudikasi statutori tidak boleh dielakkan oleh mana-mana kontrak di mana pihak-pihak telah bersetuju untuk menimbang tara (lihat perenggan 76 & 78).]

Cases referred to

All Malayan Estates Staff Union v Rajasegaran & Ors [2006] 6 MLJ 97, FC (refd)

Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd [2007] 5 MLJ 697, FC (not folld)

Attorney-General v Ting Choon Meng and another appeal [2017] 1 SLR 373, CA (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)

Gantley Pty Ltd v Phoenix International Group Pty Ltd [2010] VSC 106, SC (distd)

Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal [2013] 1 SLR 401, CA (refd)

Libra Building Construction Pte Ltd v Emergent Engineering Pte Ltd [2016] 1 SLR 481, HC (refd)

PWC Corp Sdn Bhd v Ireka Engineering & Construction Sdn Bhd and another appeal [2018] MLJU 152; [2018] 1 LNS 163, HC (refd)

Pentadbir Tanah Daerah Seberang Perai Tengah & Anor v Bagan Serai Housing Estate Sdn Bhd [2016] 5 MLJ 674; [2016] 8 CLJ 846, CA (refd)

Pepper (Inspector of Taxes) v Hart [1993] AC 593, HL (refd)

Ramli bin Shahdan & Anor v Motor Insurers' Bureau of West Malaysia & Anor [2006] 2 MLJ 116, CA (refd)

Reserve Bank of India v Peerless General Finance and Investment Co Ltd 1987 SCR (2) 1 (refd)
Rizzo & Rizzo Shoes Ltd, Re [1998] 1 SCR 27, SC (refd)
Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd [2007] 4 SLR 364, HC (refd)
Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors [2016] 1 MLJ 200, FC (refd)

Legislation referred to

Architect Rules 1973 (repealed by Architects Rules 1996) Fourth Schedule, r 21
Architects Act 1967
Architects Rules 1996
Building and Construction Industry Security of Payment Act 1999 [AU] s 19, Part 3
Building and Construction Industry Security of Payments Act 2004 [SG]
Building and Construction Industry Security of Payment Act 2002 [AU]
Construction Industry Payment and Adjudication Act 2012 ss 4, 5, 5(1), 15, 16, 36, 37
Contracts Act 1950 s 63
Courts of Judicature Act 1964 s 78(1)
Interpretation Acts 1948 and 1962 s 17A

Appeal from: Civil Appeal Nos W-02(C)(A)-1496–08 of 2016 and W-02(C)(A)-1497–08 of 2016 (Court of Appeal, Putrajaya)

M Nagarajah (Tanya Lopez with him) (Shook Lin Bok) for the appellant.
Sivabalan Sankaran (Tharmini Paramasivan and Shaun Tan Cheng Hong with him) (Tan Swee Im, Siva & Partners) for the respondent.

Zawawi Salleh FCJ (delivering judgment of the court):

INTRODUCTION

[1] This appeal concerns the interpretation of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA 2012'). On 2 January 2018, this court granted leave to appeal on four questions as follows:

(i) whether an adjudicator acts within his jurisdiction in deciding on a matter referred to him under the CIPAA 2012 when, at the time of service of the payment claim pursuant to s 5(1) of the CIPAA, the construction contract had been terminated and the termination was accepted by both parties and the claim was for determination of sums finally due to the unpaid party?

(ii) whether the CIPAA applies to final payments when the mischief which the CIPAA intends to cure, based on its Explanatory Statement and Preamble, was the timely payment for work related to progress payments and not final accounts?

(iii) whether the rule laid down by this honourable court in *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697 that disputes between an architect and his client is to be resolved by the specific provision enacted for such purpose ie r 21 of the Fourth Schedule to the Architect Rules 1973 (as amended in 1986) is still good law? and

(iv) if question (iii) is answered in the affirmative, whether the object of CIPAA to 'pay first and argue later' applies to disputes between architects and clients, since adjudication under CIPAA in this regard: (a) dispenses with the rules of evidence, discovery and the trial process; (b) is contrary to natural justice where it concerns final payments; (c) may impinge adversely on the public purse as Federal and State entities may be affected as employers of construction contract; (d) elevates the adjudicator nominated by the KLRCA as a supreme decision maker, without the possibility of supervision by the courts; and (e) on the basis of the common law principle 'interest rei publicae ut sit finis litium' (in the interest of society as a whole, there must be an end to litigation)?

[2] The parties agreed to summarise the above questions as follows:

(a) whether the CIPAA 2012 is applicable to disputes pertaining to interim claims only or is it also applicable to disputes relating to final claims? and

(b) whether the CIPAA 2012 should prevail over the Architect's Act 1973.

THE FACTUAL BACKGROUND AND THE ANTECEDENT PROCEEDINGS

[3] The factual background and the antecedent proceedings which are relevant and germane for disposal of this instant appeal may be shortly stated as follows:

(a) Martego ('the appellant') is a private limited company carrying on business in property investment, while Architect Meor & Chew Sdn Bhd ('the respondent') is a private limited company providing architectural consultancy services;

(b) the appellant engaged the respondent as a project architect for a multi-storey development project in the centre of Kuala Lumpur known as 'Cecil Central Residence', consisting of three towers of 43-storey deluxe residential units and one tower of 19-storey deluxe residential

units vide a letter of appointment dated 22 August 2014 ('construction contract'). The respondent's scope of services was for 'contract administration' and it included, but was not limited to, recommending the list of contractors and subcontractors for tender and issuing progress claim certificates the contractors upon consultation with the appellant;

(c) on 7 August 2015, the appellant terminated the respondent's service under the construction contract and the respondent accepted the termination. A dispute arose as to the amount of the professional fees for works done under the construction contract;

(d) the respondent took refuge under the CIPAA 2012 to recover its fees;

(e) in the payment and the adjudication claims, the respondent claimed for a sum of RM599,500 being the professional fees until the date of termination of the construction contract;

(f) on 14 April 2015, the adjudicator awarded to the respondent the payment in the sum of RM258,550 being the balance amount of the total entitlement of RM631,228 less the amount paid of RM372,678;

(g) being dissatisfied with the adjudicator's determination, the appellant appealed to the High Court to set aside the same premised on s 15 of the CIPAA 2012. The grounds relied upon by the appellant in his application to set aside the decision were twofold — the adjudicator had acted in excess of his jurisdiction in delivering the adjudication decision and there had been a denial of natural justice in the adjudicator's failure to hold a hearing despite numerous request from the appellant. The respondent, on the other hand, applied to the High Court to enforce the adjudicator's determination. Hence, there were applications before the High Court, namely, the appellant's application to set aside the adjudicator's determination dated 14 April 2016 and the respondent's application to enforce the adjudicator's determination;

(h) the learned High Court judge dismissed the appellant's application and allowed the respondent's application;

(i) aggrieved with the learned High Court judge's decision, the appellant filed appeals to the Court of Appeal against the decision dismissing the setting aside application and allowing the enforcement application;

(j) the Court of Appeal had, by a majority judgment (David Wong Dak Wah JCA delivered the judgment of the court, Umi Kalthum Abdul Majid JCA concurring ('majority')), dismissed the appellant's appeal and affirmed the High Court's decision. Hamid Sultan Abu Backer JCA dissented ('minority'); and

(k) dissatisfied with the majority judgment of the Court of Appeal, the appellant applied for leave to appeal to the Federal Court. Leave was granted by this court on 2 January 2018.

PARTIES' COMPETING SUBMISSIONS

[4] Learned counsel for the appellant mounted a root and branch attack on the majority. Stripped to its essentials, the nub of the appellant's submission in assailing the majority may be summarised as follows:

(a) the majority erred in fact and in law in failing to hold that the respondent could not have made a valid claim under the CIPAA 2012 when the payment claim was served after the construction contract dated 22 August 2014 between the appellant and respondent had been terminated and the respondent accepted the termination of the said contract on 7 August 2015 ('jurisdiction issue');

(b) the majority erred in fact and in law in holding that CIPAA 2012 applied to both 'interim and final claims'; and

(c) the majority erred in fact and in law in failing to hold that where a statute created a right, in plain language, which gave a specific remedy or appointing a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal and not to others.

[5] As regard ground (a), learned counsel for the appellant submitted that as a general rule, there was a requirement under the CIPAA 2012 for a construction contract to be in existence. Since the construction contract entered between the appellant and the respondent had been terminated and accepted by the respondent, then there was no longer a 'construction contract' for the purpose of the CIPAA 2012. According to learned counsel, a 'construction contract' was one in which a party undertake to carry out 'construction work', and after the determination of the contract, there was no such undertaking. Further, pursuant to cl 6 of the construction contract, the appellant's obligation to make payment to the respondent was based on the schedule/mode of payment under the said construction contract which was expressed as 'up to the point of termination only'. Under the legal maxim, 'eodem modo quo oritur, eodem modo disselvitur', an agreement created by parties may be extinguished by them by a subsequent agreement. Section 63 of the Contracts Act 1950 (Act 136) provides that if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed (see *Ramli bin Shahdan & Anor v Motor Insurers' Bureau of West Malaysia & Anor* [2006] 2 MLJ 116).

[6] The appellant also referred us to the decision of the Supreme Court of Victoria in *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106 ('Gantley') where the court considered the effect of termination of a contract at common law and said:

> 144. It is well accepted that when a contract is terminated at common law by the acceptance of a repudiation, both parties are discharged from the further performance of the contract, but rights which have directly been unconditionally acquired are not divested or discharged unless the contract provides to the contrary.

[7] Relying on *Gantley*, learned counsel further submitted that the only exception to the general rule for the requirement of a construction contract to be in existence was where an unpaid party had accrued rights under the express terms of a construction contract prior to the termination.

[8] According to learned counsel, the facts of this instant appeal revealed that the respondent's claims were not rights which were 'unconditionally acquired' prior to termination of the said contract which would have survived such termination. The adjudicator had determined that the respondent did not complete the contract documentation phase Tower 1, nor did the respondent complete the contract documentation for Towers 2 and 3. Therefore, it was the contention of learned counsel for the appellant that the respondent's claim was not a claim under the said contract. Pursuant to cl 4 of the construction contract, the respondent was only entitled to make a claim under the contract (ie to claim its first milestone/progress payment of 35%) upon completion of the contract documentation phase.

[9] In other words, learned counsel for the appellant posited that the respondent would only have accrued rights under the construction contract which would have been 'divested and discharge' upon termination if they had completed the contract documentation phase prior to the termination.

[10] Learned counsel expanded on his submission by contending that the adjudicator also did not have the jurisdiction to make a determination on a claim which was based on quantum meruit because the adjudicator was a creature of the CIPAA 2012 and derived his powers from the CIPAA 2012. Therefore, his power could not extend to adjudicating disputes beyond the terms of a construction contract.

[11] In reply, learned counsel for the respondent submitted that the CIPAA 2012, particularly s 5, did not restrict an unpaid party from issuing a payment claim upon termination of a construction contract. It should be noted that the respondent's claim under the payment claim was for the work done *before* termination of the construction contract and therefore the payment claim fell within the ambit of the CIPAA 2012.

[12] According to learned counsel, the parties' past rights and obligations prior to the termination were not affected by the termination and therefore the appellant was not relieved from its obligation to pay the respondent. Clause 6 of the construction contract merely sets out the valuation method to be adopted by parties in valuing the works done prior to the termination. The case of *Gantley* was not applicable to the case at hand.

OUR FINDINGS ON GROUND (a)

[13] This issue concerns the adjudicator's jurisdiction and turns on the proper interpretation of the construction contract in the context of the CIPAA 2012.

[14] Jurisdiction is everything and without it, a court or an adjudicator has no power to take one more step. A court of law or an adjudicator downs its or his tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction (see *Pentadbir Tanah Daerah Seberang Perai Tengah & Anor v Bagan Serai Housing Estate Sdn Bhd* [2016] 5 MLJ 674; [2016] 8 CLJ 846 (CA)). The critical issue here is whether the adjudicator had jurisdiction to adjudicate when the payment claim was served after the construction contract has been terminated.

[15] Both parties before the adjudicator accepted that the construction contract had been lawfully terminated. Clause 6 of the construction contract provides as follows:

> 6. Abandonment and termination
>
> By mutual consent, either party may terminate this appointment by serving to the other party a sixty (60) day's notice of termination. *In the event of such termination or the Client aborts or abandons the Project, the Client shall pay the Architect in accordance with the Schedule/Mode of Payment*, as outlined under item (3) above up to the point of termination. Such fees may be apportioned, if necessary, in accordance with the services rendered under a particular stage of service at the point of termination. (Emphasis added.)

[16] In our view, cl 6 of the construction contract expressly contemplates payment being made after the said contract has been terminated as it sets out the mechanism for the parties to value works done up to the date of determination. We do not regard the absence of an express provision that a party is entitled to make a payment claim after the construction contract has been terminated as warranting a different conclusion. That cl 6 equates the rights and liabilities of the parties to the general law of contract situation where the parties' past rights and obligations prior to the termination are not affected by the termination and therefore the appellant is not relieved from its obligation to pay the respondent.

[17] We entertain no doubt that the right to payment under cl 6 of the construction contract survives the termination. The respondent had carried out works prior to the termination and the past rights and obligations of the appellant are not discharged due to termination (see *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 (CA)).

[18] In our view, the respondent is entitled to the payment for work done as per the schedule stated in cl 3 of the construction contract:

3. Scope of Services

The fees proposed shall embrace architectural services for detailed design, tender and construction drawings submission, and contract management and shall include submission of amendments as may be required by the Owner, Authorities or for other reasons therefrom:

(a) Detailed Design Development

i. Upon obtaining statutory approvals, to prepare and submit plans for obtaining the building plans approval or work permit for early work commencement whichever earlier;

ii. Liaising with authorities;

iii. Proposing amendments for improvement of building design including façade treatment and planning in liaison with Chief Design Architect, Cecil Chao & Associate of Hong Kong;

iv. To coordinate with the Consultant, and to hold regularly, the Technical and the Client-Consultant Meetings;

v. To inform the Client on a regular basis on the Status of the Project and other technical and financial issues;

vi. To seek Client's approval on all matters involving cost implications and selection of building products.

(b) Contract Administration

i. Work in collaboration with all the Consultant in preparing the Tender documentation, detail drawings, and working drawings for construction;

ii. To recommend the list of Contractors and Sub-Contractors for Tenders;

iii. To award the Contract on the Client's behalf;

iv. To coordinate and to conduct regular site meeting;

v. To report on the Status of the Project;

vi. To issue the Progress Claim Certificates to the Contractors(s) upon consultation to the Client;

vii. To issue the Progress certificates certifying the Stage Completion upon request by the Client;

A viii. Upon satisfactory completion of the Project, apply to the authority for the Certificate of Completion and Compliance ('CCC').

(c) Others

i. Any other matters deemed necessary.

B

[19] In his endeavour to persuade us, learned counsel for the appellant urged us to affirm the views of the learned dissenting judge who endorsed the views of the Supreme Court of Victoria in *Gantley* which held that the Old Victorian Act provides for payment claims to be served after termination under two C limited circumstances only:

(a) where the construction contract expressly or impliedly provides for a payment claim to be served following termination; and

(b) where, immediately prior to termination, the claimant is entitled to a D progress payment for work done prior to termination where the relevant reference date has arisen prior to the termination.

(See paras 174–175 of *Gantley* judgment.)

E **[20]** We observe that the case of *Gantley* was referred to in both the majority and dissenting judgments of the Court of Appeal. It is, therefore, apposite for us to discuss the case. The facts of the case may be summarised thus: Phoenix International Group Pty Ltd (Phoenix) (defendant) was engaged by Gantley Pty Ltd (Gantley) (plaintiff) to construct various dwellings. In May and July F 2009, Phoenix served payment claims on Gantley for each project, and in response Gantley in each case served 'nil' payment schedules under the Victoria Act. The matter went for adjudication. Gantley argued that the payment claims were contrary to the Victoria Act and invalid as they did not properly identify the construction work to which the claims related. The adjudicator G determined, however, that the sums claimed by Phoenix were valid and were due to it. Gantley issued proceedings in the Supreme Court to review the adjudicator's decision.

[21] Vickey J decided that a payment claim that did not reasonably specify H the work done, which was the subject of the payment claim, would be invalid because one of the basic and essential requirements of the Victoria Act had not been met. Any adjudication founded on an invalid payment claim would itself be invalid, at least to that extent.

I **[22]** His Honour found that the disputed payment claims were invalid and ordered the adjudication determinations to be void. In determining the degree of specificity, it was necessary to identify the work sufficiently for the respondent to a payment claim to understand the basis of the claim and provide a considered response. The standard is that of a reasonable person who is in the

position (and has the knowledge) of the recipient. His Honour held that severance of part of a payment claim, which is non-compliant with the Victoria Act, is possible. His Honour also held that service of a progress claim under the Victoria Act after termination of the contract is valid where:

(a) the contract expressly or impliedly allows this; or

(b) there is an accrued right to a progress payment before termination for work done prior to termination,

and the fact that the amended Victoria Act now provides for a 'final progress payment' demonstrates that the intention of the previous version of the Victoria Act was to allow for a final progress claim.

[23] The majority rejected the application of the case of *Gantley* and stated that it had no application to the case at hand. We are fully in agreement with the majority for the following reasons:

(a) the factual matrix of *Gantley* is different from that in the present appeal. The claim in *Gantley* was about the damages arising from a repudiation while the claim by the respondent in this instant case is for work done. The issue of whether the termination was due to a repudiation was never raised and decided in *Gantley*; the termination letter was not exhibited. The facts in *Gantley* are poles apart from the facts of the case before us; and

(b) the court in *Gantley* discussed the validity of the progress claim made pursuant to a final claim arising out of a termination. The progress claim issued pursuant to the old Victorian Act did not cover the final claim disputes. This is not the case under the CIPAA 2012. Plainly, the issue before *Gantley* is not germane to the issue before us.

[24] On the issue of deriving assistance from foreign case law in interpreting our legislations; we say it must be exercised with circumspection. This is because the resort to case law of foreign jurisdictions by persons not fully acquainted with the practice in these jurisdictions or with the concept and techniques of foreign system entails a real risk that foreign legal position would be misinterpreted.

[25] Concerning ground (b), learned counsel for the appellant vehemently argued that the CIPAA 2012 did not cover claims for final accounts or sums finally due to unpaid party unless the contractual mechanism for the payment of the final accounts (if provided under the contract) had been engaged.

[26] In support of his submission, learned counsel advanced, inter alia, the following reasons:

A (a) the phrase 'final account' is notably absent in the the CIPAA 2012. The glaring omission of this phrase from the CIPAA 2012 is an indication of the draftsmen's intention to exclude final account;

(b) existence of s 36 of the CIPAA 2012 (a default provision that can be
B applied in the absence of payment terms in the construction contract) and reading of the CIPAA 2012 in its entirety will indicate that the CIPAA 2012 was intended to apply to interim claims only;

(c) the main purpose of the CIPAA 2012 was to assist the parties of the construction contract to receive prompt payments for work done
C pursuant to their construction contract and the adjudication proceedings was set out to advance the said purpose. The the CIPAA 2012 was intended to be applied to interim claim which involved payments on account. Hence, any dispute as to the amount that is finally due is to be resolved through other dispute resolution forum such as
D court or arbitration;

(d) the construction contract had provided the time period to make an interim and final claim. In the present appeal, the invoice was not made pursuant to the time and therefore it was neither a progress claim nor a
E final claim;

(e) the majority fell into serious error in holding that Australia State of Victoria's Building and Construction Industry Security of Payment Act 2002 (Victoria No 15 of 2002) ('Old Victorian Act')'s interpretation of 'rights to progress claim' has no significance on the basis that the context
F in which the phrase was interpreted in the Old Victorian Act is different from the CIPAA 2012. In actual fact, the CIPAA 2012 and the old Victorian Act are glaringly similar as both Acts require the existence of construction contract for a payment claim to be made specifically refers to 'progress payment' and do not expressly exclude the application of the
G Act to final claims; and

(f) Singapore Building and Construction Industry Security of Payments Act 2004 ('the SOPA') does not resemble the CIPAA 2012 due to the absence of the phrase 'right to progress payment' and existence of
H definition to the 'progress payment'.

[27] In response, learned counsel for the respondent submitted that there is no limitation to the CIPAA 2012 in relation to final and interim claims. The CIPAA 2012's primary objective is to alleviate the cash flow and this is done by
I eliminating payment issues quickly. It is the contention of learned counsel that limiting the CIPAA 2012 to interim claims will prejudice the claimant's right to payment and such limitation will defeat the very purpose of the CIPAA 2012 which was to alleviate cash flow in the construction industry through an effective adjudication mechanism.

[28] Learned counsel for the respondent urged this court to adopt a purposive approach in interpreting the CIPAA 2012 as mandated by s 17A of the Interpretation Acts 1948 and 1967.

[29] Learned counsel contended that the distinction on whether a claim is final or interim is unnecessary in providing a right for payment which is intended to alleviate the cash flow issue in the industry and will affect the stakeholders in the construction chain who are financially weaker than the appellant as in the present case. Further, drawing the distinction between final or interim will only destroy the robust change that the industry has started to experience.

OUR FINDINGS ON GROUND (b)

[30] We are of the opinion that the majority was on firm ground when it held that Australian State of Victoria's Building and Constructions Industry Security of Payment Act 2002's interpretation of a 'right to progress claim' is not relevant to the interpretation of the CIPAA 2012.

[31] The CIPAA 2012 is not modelled after the Old Victorian Act. The purpose of the Old Victorian Act is more to safeguarding the interest of individuals compared to the CIPAA 2012 which was intended for the construction industry as a whole. The purpose of Singapore Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ('the SOPA') is similar to the CIPAA 2012. Hence, in our view, referring to SOPA rather than the Old Victorian Act in interpreting 'final claim' will be more appropriate.

[32] At the outset, it is pertinent to note that the issue of applicability of the CIPAA 2012 to a final or interim claim was not raised by the parties before the Court of Appeal. In the course of argument before the court, the following questions were posed by the court to the parties:

(a) whether the subject matter of the adjudication was based on interim payment claim or a final claim.

(b) whether statutory adjudication in other jurisdiction makes a distinction between final bills and interim bill.

[33] Despite of objection raised by learned counsel for the respondent, the Court of Appeal proceeded to deliberate on the issues on the ground that the issues were relevant to the adjudicator's jurisdiction. The court held that jurisdictional challenge had always been allowed by the courts at any stage of proceedings.

A **[34]** On question (a), the majority held that as long as the claims are payment claims relating to a construction contract as defined in s 4 of the CIPAA 2012, the Act comes into play. That being the case, it does not matter whether the payment claims were interim or final claims made after unilateral or mutual termination.

B

[35] On question (b), the majority reasoned that the Old Victorian Act relied by the appellant, as interpreted by the Victoria Supreme Court on the phrase 'right to progress payment' in s 19 was housed in Part 3 the Act — 'Right to Progress Payment', was of no significance as the context in which it C was interpreted was totally different from the case at hand. In the CIPAA 2012 there are specific provisions which allow a claimant to make a claim in respect of all payment for works and services done under a construction contract. Hence, the decision in *Gantley* cannot be used to support the proposition of the D appellant (see para 45 of the majority judgment of the Court of Appeal).

[36] The minority came to a different conclusion. The minority was of the opinion that if there had been no determination, their claims would have been for interim payment and the matter could be referred to the CIPAA 2012. If E the contract had been terminated and accepted as in the instant case, then the claim of the respondent would relate to final account or final payment and in consequence the CIPAA 2012 would not be applicable. Since the claim by the respondent in this instant appeal was not related to the CIPAA 2012, the adjudicator would not have the jurisdiction to hear the dispute (see paras 78 F and 81 of the minority judgment).

[37] The minority further held that if the CIPAA 2012 was made applicable to final account or final payment in relation to construction disputes as opposed to construction contract for interim payment, it may lead to an abuse G of process. According to the minority, it was wrong to construe the CIPAA 2012 to include claims for final payment when the mischief it intended to cure was the timely payment for work related to progress payments and not the final account. It was principally wrong to read into the Act the phrase 'final payment' when Parliament has not expressly stated so and the holistic reading H of the Act would learn towards interim payment only (see para 75 of the minority judgment).

[38] With respect, we are unable to agree with the minority and we are in full agreement with analysis of the majority that as long as they are payment claims I relating to a construction contract as defined in s 4 of the CIPAA 2012 would applied. In our view, it is difficult to fathom any basis for concluding that Parliament intended a bifurcated approach depending on the type of claim. We could see no conceivable basis and/or logical reason that the Parliament would have intended a different approach between the interim payment and final

payment. If the Parliament had intended to exclude final claims from the adjudicatory ambit of the CIPAA 2012, it could have clearly included a proviso or provisions to that effect. Further, if the Parliament had intended a different approach for interim and final claims, the Parliament would have deliberately utilised a different language evincing such an intention.

[39] In our view, the interpretation expounded by the majority is consistent with the purpose and structure of the adjudication process outlined in the CIPAA 2012. The modern approach to interpretation of statute mandates that a construction of a statute which promotes the purpose or object of an Act is to be preferred to a construction which does not. For this purpose, all extrinsic materials may be consulted. For example, courts are prepared to consider the *Hansard* debates, the preamble, the explanatory notes to the bill and Law Commission Report. However, that does not mean that ordinary meaning or clear language may be discarded, for construction and/or interpretation is not divination and courts must respect separation of powers when construing the Acts of Parliament.

[40] The leading case in which a purposive approach was accepted by the House of Lords was *Pepper (Inspector of Taxes) v Hart* [1993] AC 593. The case established the principle that when primary legislation is ambiguous and certain criteria are satisfied, courts may refer to statements made in the House of Commons or the House of Lords in an attempt to interpret the meaning of the legislation. The House of Lords held that courts could now take a purposive approach to interpreting legislation when the traditional methods of statutory construction are in doubt or result in an absurdity. To find what the Parliament intended, all sources including *Hansard* may be consulted. Lord Griffiths said:

> My Lords, I have long thought that the time had come to change the self-imposed judicial rule that forbade any reference to the legislative history of an enactment as an aid to its interpretation. The ever increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted. The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted. Why then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament?

[41] In a similar vein, in *Re Rizzo & Rizzo Shoes Ltd* [1998] 1 SCR 27, Justice Lacobucci of the Canada Court, speaking for whole court, wrote the following:

Elmer Driedger in Construction of Statutes (2nd ed 1983) best encapsulates the approach upon which I prefer to rely. He recognises that statutory interpretation cannot be founded on the wording of the legislation alone. At p 87 he states: 'Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[42] In *Attorney-General v Ting Choon Meng and another appeal* [2017] 1 SLR 373, Sundaresh Menon CJ of Singapore Court described the approach towards the purposive interpretation of statutory as follows:

59. ... [T]he court's task when undertaking a purposive interpretation of a legislative text should begin with three steps:

(a) First, ***ascertaining the possible interpretations of the text***, as it has been enacted. This however should never be done by examining the provision in question in isolation. Rather, it should be undertaken having due regard to the context of that text within the written law as a whole.

(b) Second, ***ascertaining the legislative purpose or object of the statute***. This may be discerned from the language used in the enactment; ... it can also be discerned by *resorting to extraneous material in certain circumstances*. In this regard, the court should principally consider the general legislative purpose of the enactment by reference to any mischief that Parliament was seeking to address by it. In addition, *the court should be mindful of the possibility that the specific provision that is being interpreted may have been enacted by reason of some specific mischief or object that may be distinct from, but not inconsistent with, the general legislative purpose underlying the written law as a whole*. ...

(c) Third, ***comparing the possible interpretations of the text against the purposes or objects of the statute***. *Where the purpose of the provision in question as discerned from the language used in the enactment clearly supports one interpretation, reference to extraneous materials may be had for a limited function — to confirm but not to alter the ordinary meaning of the provision as purposively ascertained* ... (Emphasis added in italics and bold italics.)

[43] In Malaysia, the requirement to have regard to purpose of an Act is contained in s 17A of the Interpretation Acts 1948 and 1962 which are in the following terms:

17A Regard to be had to the purpose of Act

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[44] On proper application of the provision of the s 17A of the Interpretation Acts 1948 and 1983, we refer to the case of *All Malayan Estates*

Staff Union v Rajasegaran & Ors [2006] 6 MLJ 97 wherein the Federal Court had laid down the principle, inter alia, as follows:

> In summarising the principles governing the application of the purposive approach to interpretation, *Craies on Legislation (8th Ed), says at p 566*:
>
> (1) Legislation is always to *be understood first in accordance with its plain meaning*.
>
> (2) *Where the plain meaning is in doubt the courts will start the process of construction by attempting to discover, from the provisions enacted, the broad purpose of the legislation*.
>
> (3) *Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading*.
>
> (4) Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the result will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.
>
> (5) Where the courts conclude that the underlying purpose of the legislation is insufficiently plain, or cannot be advanced without any unacceptable degree of violence to the language used, they will be obliged, however regretfully in the circumstances of a particular case, to leave to the legislature the task of extending or modifying the legislation. (Emphasis added.)

[45] In *Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors* [2016] 1 MLJ 200 at p 218, the Federal Court considered the 'settled general rule' that 'when a statute is susceptible of two or more interpretations, normally that interpretation should be accepted as reflecting the will of the legislation which is presumed to operate most equitably, justly and reasonably as judged by the ordinary and normal conceptions of what is right and what is wrong and of what is just and what is unjust'.

[46] At the risk of repetition, we say that the *raison d'être* of the CIPAA 2012 regime lie in facilitating and providing remedies for the recovery of payment in the construction industry. the CIPAA 2012, brings three major changes to the construction industry in Malaysia:

(a) a 'right to progress payment', unless otherwise agreed to by the parties;

(b) a speedy resolution through adjudication for construction disputes relating to payment for works carried out under the construction contract; and

(c) a determination which has temporary finality. A party, which executes construction work and which is unpaid in whole or in part, under the construction contract may serve a payment claim on non-paying party to the construction contract.

[47] From the Preamble, it is clear that the CIPAA 2012 is 'An Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters'.

[48] The Explanatory Statement to the CIPAA Bill 2011 states as follows:

... EXPLANATORY STATEMENT

The Construction Industry Payment Adjudication Act 2011 ('the proposed Act') seeks to *facilitate regular and timely payment in respect of construction contracts and to provide for speedy dispute resolution* through adjudication. *The purpose* of the proposed Act *is to alleviate payment problems that presently prevails pervasively and which stifles cash flow in the construction industry*. The proposed Act further provides default payment terms in the absence of provisions to that effect and prohibits conditional payment terms that inhibit cash flow. The act also seeks to provide remedies for the recovery of payment upon the conclusion of adjudication. (Emphasis added.)

(See: Explanatory Statement of CIPAA Bill 2011)

[49] The speech by the Deputy Minister during the Second Reading of the Bill to introduce the CIPAA 2012 in Dewan Rakyat on 2 April 2012 revealed that the *raison d'être* of the CIPAA 2012 is to resolve the payment problem and facilitate regular and timely payment, provide for speedy dispute resolution through adjudication:

12. Tuan Yang di-Pertua, industri pembinaan mempunyai potensi yang tinggi untuk terus berkembang. Antara cabaran yang perlu ditangani bagi mencapai aspirasi ini ialah *isu pembayaran yang melibatkan* pihak-pihak dalam rantaian pembinaan termasuk kontraktor utama, subkontraktor, sub- subkontraktor, para perunding dan pembekal-pembekal bahan-bahan. *Sekiranya masalah pembayaran ini* tidak ditangani dengan berkesan, ia boleh *menjejaskan aliran tunai dan seterusnya menyebabkan kelewatan menyiapkan projek, kemerosotan kualiti kerja, peningkatan kos dan dalam kes-kes kritikal, kontrak akan ditamatkan* ...

Pendek kata, *tempoh masa yang lama dan kos prosiding yang tinggi* adalah merupakan antara *faktor utama yang mengekang pihak-pihak terlibat untuk merujuk pertikaian kepada mahkamah atau timbangtara. Justeru itu, kerajaan amat prihatian dengan isu pembayaran dalam industri pembinaan* dan telah menggubal Rang Undang-undang Pembayaran dan Adjudikasi Industri Pembinaan 2011 bagi membantu pihak-pihak yang terlibat untuk menyelesaikan pertikaian pembayaran dengan mudah, murah

dan cepat. Rang undang-undang ini diwujudkan selepas diadakan beberapa siri perbincangan dan dialog bersama agensi kerajaan, penggiat industri, pihak-pihak yang berkepentingan atau stake holders dan badan profesional yang berkaitan.

...

Pertikaian yang boleh dirujuk kepada adjudikasi adalah berkaitan dengan pembayaran bagi kerja siap atau perkhidmatan yang dibekalkan, yang sepatutnya dibayar di bawah terma-terma nyata kontrak dalam kontrak pembinaan. Ia termasuklah bayaran interim mengikut kemajuan kerja. Prosiding adjudikasi boleh dimulakan sebaik sahaja timbul pertikaian pembayaran sama ada semasa projek pembinaan sedang dijalankan atau selepas projek disiapkan ... (Emphasis added.)

(See the Deputy Minister's Policy Speech in Dewan Rakyat and the summary of the speech by Mary Lim J (as she then was) in *Uda Holdings v Bisraya Construction Sdn Bhd & Anor and another case* [2015] 5 CLJ 527).

[50] It can be clearly discerned from the Deputy Minister's speech that the CIPAA 2012 is enacted by the Parliament to provide an easily accessible, faster and cheaper resolution forum ie the adjudication. The following characteristics of the CIPAA 2012 is in tandem with the said intent:

(a) it involves tight time constraints. The deadline for each step is fixed and the timeline for each stage is relatively short to ensure that the disputes are resolved rapidly and quickly;

(b) it involves a significant degree of informality;

(c) it gives adjudicator's determination a degree of conclusiveness;

(d) it involves rights which are interim only. The rights and liabilities under the Act do not affect other entitlement a person may have under a construction contract or any other remedy a person may have for recovering such entitlement;

(e) the standard adjudicator's fee is introduced and the charges are cheaper than arbitration. Low-cost decision making is a core object of the scheme in the Act; and

(f) the grounds on which the court can rely upon to set aside the adjudicator's determination are limited. The court primary duty must be to uphold the adjudicator's determination and not to revisit the factual or legal matters canvassed before the adjudicator.

[51] It is clear, therefore, that the issue of cash flow is the primary objective of the CIPAA 2012 as it is deemed to be the life-blood of the construction industry. This position has been recognised by our courts.

[52] In the case of *PWC Corp Sdn Bhd v Ireka Engineering & Construction Sdn Bhd and another appeal* [2018] MLJU 152; [2018] 1 LNS 163, Lee Swee

Seng J in refusing a stay application pursuant to s 16 of the CIPAA 2012, observed the purpose of the CIPAA 2012 as follows:

> [111] Whilst the Respondent had fulfilled the threshold condition of obtaining a Stay in that a Notice to Arbitrate has been served on the Claimant and that the Arbitration would decide fully and finally all issues that have arisen in the dispute between the parties, that threshold is only a mere trigger for the Court to consider exercising its discretion with respect to Stay. It is not the 'be all and end all' of the consideration for Stay of the Decision for otherwise it would be a *carte blanche* for all who have an Adjudication Decision against them to effectively get a Stay of the Decision by serving a Notice of Arbitration or to file a Writ against the successful Claimant. That would be to denude *the CIPAA of its designed purpose of facilitating cash flow in the construction industry and promoting prompt payment for work done for which the contractor is already out of pocket. The construction scene is strewn with sob stories of contractors who have fallen down the slippery slope of financial stress simply because payments for work done or services rendered were delayed.* (Emphasis added.)

[53] When the High Court decided on both the enforcement and setting aside applications, the learned judge made the following observations:

> [93] In all this debate we must not forget Parliament's intention in enacting CIPAA is to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters. The objective and purpose for CIPAA are to provide a solution to payment problems that stifles cash flow in the construction industry ...

[54] The majority shared the same view on the CIPAA:

> 38. ... Here of course there is no specific provision in CIPAA 2012 which states that it only applies to 'interim payment claims' or that it applies to both 'interim and final claims'.
>
> 39. In the case of CIPAA 2012, this is what was stated the Explanatory Statement to the Bill which was presented to Parliament —
>
> > The Construction Industry Payment Adjudication Act 2011 ('the proposed Act') seeks to facilitate regular and timely payment in respect of construction contracts and to provide for speedy dispute resolution through adjudication. The purpose of the proposed Act is to alleviate payment problems that presently prevail pervasively and which stifle cash flow in the construction industry. The proposed Act further provides default payment terms in the absence of provisions to that effect and prohibits to that effect and prohibits conditional payment terms that inhibit cash flow. The Act also seeks to provide remedies for the recovery of payment upon conclusion of adjudication.
>
> 41. Nowhere in the Explanatory Statement does it state that CIPAA 2012 applies only to interim payments claims. Its primary objective is succinctly clear and that is to provide an effective and economical mechanism to alleviate the cash flow issues prevailing in the construction industry.

[55] We have also perused and scrutinised the Preamble, the Explanatory Notes to the Bill and the speech of the Deputy Minister when tabling the CIPAA Bill. We have no hesitation in agreeing and endorsing the interpretation expounded by the High Court and the majority. It is clear from the materials mentioned above that the primary objective of the CIPAA 2012 is to alleviate cash flow issues by providing an effective and economical mechanism. The courts are consistent on the finding that the CIPAA 2012 is intended to alleviate cash flow issue. Therefore, the mischief that the CIPAA 2012 intends to cure is none other the cash flow in the construction industry through effective and economical mechanism; for deciding otherwise would run counter to the legislative purpose of creating an expedited adjudication process.

[56] We are in agreement with the submission of learned counsel for the respondent that there is no rhyme or reason for this court to confine the applicability of the CIPAA 2012 to 'interim claim' only. The CIPAA 2012 does not mention the words 'interim claim' or 'final claim'. 'Payment' is defined under s 4 of the CIPAA 2012 to mean a payment for work done or service rendered under the express terms of a construction contract.

[57] It is well-established principle of interpretation that the court cannot rewrite, recast or reframe the legislation because it has no power to do so. The court cannot add words to a statute or read words which are not there. It is also well settled canon of construction that words in a statute cannot be read in isolation, their colour and content derived from their context and every words in a statute is to be examined in its context. The word context has to be taken in the widest sense where the court must take into consideration not only the enacting provisions of the same statute, but its preamble, the existing state of law, other statutes in pari materia, and the mischief which the statute is intended to remedy. In *Reserve Bank of India v Peerless General Finance and Investment CoLtd* 1987 SCR (2) 1, Chinnappa Reddy J said:

> Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when the object and purpose of its enactment is known. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute maker, provided by such context its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as

A to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.

B **[58]** Section 4 of the CIPAA 2012 defines certain key words as follows:

'construction contract' means a construction work contact or construction consultancy contract;

'non-paying party' means a party against whom a payment claim is made pursuant to a construction contact;

C 'payment' means a payment for work done or services rendered under the express terms of a construction contract;

'unpaid party' means a party who claims payment of a sum which has not been paid in whole or in part under a construction contract.

D **[59]** Section 5 provides:

5 Payment claim

(1) An unpaid party may serve a payment claim on a non-paying party for payment pursuant to the construction contract.

E (2) The payment claim shall be in writing and shall include —

(a) the amount claimed and due date for payment of the amount claimed;

(b) details to identify the cause of action including the provision in the construction contract to which the payment relates;

F (c) description of the work or services to which the payment relates; and

(d) a statement that it is made under this Act.

G **[60]** Sections 4 and 5 stipulate who, when and how one can initiate proceedings under the CIPAA 2012:

(a) who can claim — an unpaid party who is being owed payments for work done (either part of payment or full payment) under an express provision of a construction contract;

H (b) when can claim-once work is done and the payment is due under the express provisions of the construction contract; and

(c) how to initiate proceedings under the CIPAA 2012 — issue a payment claim.

I **[61]** There can be no doubt that so long as there is a sum payable under a construction contract for work done and as long as the party remains unpaid, the claim can still be brought against the other party through the CIPAA 2012

as it is payment dispute under the construction contract. The section does not suggest that the payment claim should be confined to interim claims only.

[62] We also agree with the High Court and the majority that referring to SOPA over old Victorian Act in interpreting 'final claim' will be more appropriate. SOPA applies to payments for construction works done or goods or service rendered for the construction industries.

[63] Similar to the position in Malaysia, the SOPA is silent to the word 'final claim'. The word 'progress payment' in SOPA does not mention anything regarding a final account. The Singapore Court had attempted to define progress payment in the case of *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR 364 where Justice Lai Siu Chiu stated as follows:

> [24] Adopting a literal perspective, such an interpretation is justified by the unambiguous wording of the Act, which defines 'progress payments' as 'a payment to which a person is entitled for the carrying out of construction work or the supply of goods or services, under a contract' ('the main limb'). Such a definition expressly *includes* a 'single or one-off payment' or a payment 'based on an event or date' ('the supplementary limb').
>
> [25] *The plaintiff had submitted that the Act does not cover final claims on the basis that they are not expressly provided for*. I have several comments to make on this submission. First, the word 'includes' alludes to the non-exhaustive nature of the sub- provisions that follow. From this perspective, the operative definition of 'progress payment' should be centred on the *main* limb rather than the supplementary limb.
>
> [26] The plaintiff appeared to have adopted the tack that 'final payments' should not be included simply because they were not specifically identified in the supplementary limb as included within the main limb. This approach, with respect, neglects the structure of the provision, which unambiguously defines 'progress payments', at the outset, as payments to which a person is entitled for the carrying out of construction work under a contract.
>
> [27] *Looking at the structure and wording of the provision, it appears that an exclusion of 'final payments' from the ambit of the Act can only be justified by express wording to that effect. It would not suffice to infer a legislative intention to exclude simply on the basis that 'final payments' were not included in a non-exhaustive supplementary definition, ostensibly provided for clarification. If the Legislature had intended to exclude final claims from the adjudicatory ambit of the Act, it could have clearly included a proviso or provision to that effect. In the absence of such express exclusion, the primary broad-ranging definition in the main limb must be determinative*.
>
> [28] *In addition, a plain reading of 'a payment that is based on an event or a date' or a 'single or one-off payment' clearly encompasses final payments. Such a conclusion is vindicated by the fact that the Act at no time makes any distinction between 'final claims'*

A *and 'non-final claims'. Implying such a distinction from the supplementary limb would severely impair the protection afforded by the Act, as it would create a carte blanche for contractors to renege on the final stages of payment, which would have an equally deleterious effect on cash flow affecting other ongoing construction projects.* (Emphasis added.)

B

[64] In the case of *Libra Building Construction Pte Ltd v Emergent Engineering Pte Ltd* [2016] 1 SLR 481, the Singapore High Court compared SOPA with New South Wales Building and Construction Industry Security of Payment Act 1999. On the issue of final account, the court stated as follows:

C 46. First, 'progress payment' is defined in very similar language in both statutes save that the *NSWA has an expanded definition to make clear that a final payment under a construction contract is also a 'progress payment'*. This is not a material difference as it was decided by this court in *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Ltd* [2007] 4 SLR(R) 364 ('Tiong Seng Contractors') (at [27]) (approved in Chua Say Eng (at [95])) *that a final payment would be regarded as a 'progress payment' under the Act*.

D

[65] In the case of *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* E [2013] 1 SLR 401, the Singapore Court of Appeal had stated as follows:

95. The other point to note in this case is that PC6 was a final claim for payment and not a progress payment. The Act is expressed to apply to progress payments (s 5). The expression 'progress payment' is defined in s 2 as follows:

F 'progress payment' means a payment to which a person is entitled for the carrying out of construction work, or the supply of goods or services, under a contract, and includes —

(a) a single or one-off payment; or

(b) a payment that is based on an event or a date ...

G *Even though no argument has been made to us on whether a final payment is a progress payment as defined, it seems to us that the definition is wide enough to include a final payment as it is a payment, albeit final, to which a person is entitled for the carrying out of construction works*. (Emphasis added.)

H

[66] The Singapore courts are of the opinion that the definition of progress payment is wide enough to include the final payment as the payment under final account is also for work done or services rendered. So too the CIPAA 2012.

I

[67] A broader view in understanding s 5 of the CIPAA 2012 is supported by Datuk Professor Sundra Rajoo in 'A Practical Guide to Statutory Adjudication in Malaysia', which was published by KLRCA, wherein the learned author said:

Payment: Under CIPAA, the unpaid party is only allowed to refer a 'payment' dispute to adjudication. Section 4 defines payment to mean 'payment for work done or services rendered under the express terms of a construction contract'. As such, the definition excludes reference of extra — contractual claims, such as tortious claims or general damages arising from breaches of contract. Unlike the statutory adjudication regime in the United Kingdom which allows all disputes arose under a construction contract to be adjudicated upon, the scope of application of CIPAA is restrictive to payment disputes under a construction contract. However, the parties may expand the scope of reference of the adjudication to matters other than 'payment' disputes.

'Payment' in this context refers to payment for 'construction work' done and 'consultancy services' rendered arising 'under the express terms' of the construction contract.

Falling under this category are progress payments, whatever their form and frequency of disbursement (ie monthly, stage payment, advance payment, etc), final payment, etc. It should also cover items of payment such as for varied work or changes, diminution in value, prime cost sums, preliminaries, cost adjustments, provisional sums, contingent sums, retention sums etc. so long as these are expressly provided for under the construction contract in question. (Emphasis added.)

[68] That, however, is not the end of the matter. Learned counsel for the appellant relied on s 36 of the CIPAA 2012 in contending that the intention of Parliament in enacting the CIPAA 2012 is to adjudicate interim claim only.

[69] Section 36 of the CIPAA 2012 is in the following terms:

Section 36 of CIPAA

(1) *Unless otherwise agreed by the parties*, a party who has agreed to carry out construction work or provide construction consultancy services under a construction contract has the right to progress payment at a value calculated by reference to —

(a) the contract price for the construction work or construction consultancy services;

(b) any other rate specified in the construction contract;

(c) any variation agreed to by the parties to the construction contract by which the contract price or any other rate specified in the construction contract is to be adjusted; and

(d) the estimated reasonable cost of rectifying any defect or correcting any non-conformance or the diminution in the value of the construction work or construction consultancy services performed, whichever is more reasonable.

(2) In the absence of any of the matters referred to in paragraphs (1)(a) to (d), reference shall be made to —

A (a) the fees prescribed by the relevant regulatory board under any written law; or

(b) if there are no prescribed fees referred to in paragraph (a), the fair and reasonable prices or rates prevailing in the construction industry at the time of the carrying out of the construction work or the construction consultancy services.

B (3) The frequency of progress payment is —

(a) monthly, for construction work and construction consultancy services; and

C (b) upon the delivery of supply, for the supply of construction materials, equipment or workers in connection with a construction contract.

(4) The due date for payment under subsection (3) is thirty calendar days from the receipt of the invoice. (Emphasis added.)

D

[70] In addressing the issue of the appellant's reliance on s 36 of the CIPAA 2012, the majority disagreed with the appellant's contention and reasoned as follows:

E [45] The reliance on the words 'right to progress payment' appearing in section 36 of CIPAA 2012, with respect, is misconceived and our reasons were these. Section 36 is actually housed in Part VI of the Act which is titled 'General' inferring expressly that the provisions are of a general nature as opposed to a specific one. Further, section 36 is titled and relates to 'Default Provisions in the absence of Terms of Payment'. That section primarily talks of what regime of payment mode is F applicable when there are no provisions in the construction contract. Hence, it can be said that the appearance of the phrase 'right of progress payment' in section 36 is of no significance in determining what kind of payment claims CIPAA 2012 applies to which are specifically provided for in the form of sections 2, 4 and 5. To impute that CIPAA 2012 applies only to interim payment would be breaking a golden rule G of construction of statute in not looking at the specific provisions in the context of the whole Act and referring to other provisions contained therein.

[71] We agree with what was stated by the majority. In our view, s 36 of the CIPAA 2012 is a fall-back section when there is no agreed contractual H provision as to payment or payment terms are inadequate or unworkable. With respect, relying on s 36 of the CIPAA 2012 alone in interpreting the intention of the CIPAA 2012 will amount to a narrow interpretation and has no legal basis.

I **[72]** In the light of the above discussion, the appellant's challenge on the jurisdiction of the adjudicator to adjudicate the matter is bereft of merit and, therefore, must fail.

[73] On ground (c), the main plank of the learned counsel for the appellant's

submission is that the Architects Act 1967 ('the AA') and the Architects Rules 1996 ('the Rules') provide for a specific dispute resolution mechanism vis a vis architect's fees; the dispute is one which ought to have been arbitrated instead of adjudicated under the CIPAA 2012.

[74] Learned counsel for the appellant argued that the Rules make it mandatory for the professional architect and client to appoint an arbitrator within 124 days of receipt of a notice in writing informing the other party of the matter in dispute, failing which the President of the Board of Architect Malaysia (BAM) shall appoint an arbitrator.

[75] Learned counsel for the appellant further submitted that this court ought to have followed the decision of the Federal Court in *Akitek Tenggara Sdn Bhd*. According to him, the case is still good law.

[76] We are not persuaded. We are fully in agreement with the learned High Court judge that there is nothing to stop the CIPAA 2012 from applying to the case at hand and there is no need to see adjudication and arbitration to be mutually exclusive to each other. At pp 615–616, *R/R* (*Jld* 6) of his ground of judgment, the learned High Court judge stated:

> [76] I agree that the dispute resolution mechanism under CIPAA is by way of Adjudication and the statutory requirement for dispute resolution under the Architects Act is by way of Arbitration. I must also state that there is nothing strange in this difference as statutory Adjudication came into being only with the coming into force of CIPAA on 10 April 2014 and that there is no need to see Adjudication and Arbitration to be mutually exclusive of each other as Adjudication would only yield a decision of temporary finality and it is only with Arbitration or Litigation that one gets a final and binding decision. The whole scheme of statutory Adjudication was never intended to be set in opposition to Arbitration or Litigation. Adjudication operates independently on a separate track and indeed a fast track and it will not run into collision with Arbitration or Litigation simply because its track is different. Before there was Adjudication, there were already Arbitration and Litigation. After the introduction of Adjudication, both Arbitration and Litigation will still continue except that now there is an additional dispute resolution mechanism of temporary finality that can be embarked upon before or concurrently with Arbitration or Litigation as the case may be. Thus one need not have to choose in an 'either or' approach between Adjudication and Arbitration but one can proceed in a 'both and' approach in resolving a dispute on an architect's claim against his client for his professional fees. Adjudication under CIPAA was never designed to be in conflict with Arbitration and Litigation and so its process may be activated at any time where there is a valid payment claim under a construction contract. Premised on that proper perspective, the question of which would prevail over the other does not arise at all.

[77] The High Court's view was endorsed by the majority. The majority

A stated:

> [48] In any event, an adjudication award is only of a 'temporary finality' in nature against the main contractors and owners. CIPAA 2012 allows parties to take their grievances to the High Court prior to the adjudication process, concurrent with the adjudication application and even after the adjudication process notwithstanding the adjudication decision to determine the very construction dispute before the adjudicator. Reference to an arbitration tribunal is also available to the parties and the factual findings of the adjudicator are not binding on either the High court or the arbitration tribunal. This is specifically provided for in section 37 of CIPAA 2012.

[78] Further, s 37 of the CIPAA 2012 provides that an adjudication proceeding, arbitration and court litigation may proceed concurrently and in parallel. It is also apparent that adjudication is a mandatory procedure under the CIPAA 2012 and the right to statutory adjudication should not be circumvented by any contract where parties have agreed to arbitrate.

ANSWER TO LEAVE QUESTIONS

[79] In the light of what we have said thus far, our answers to the leave questions posed are as follows:

(i) the first question — in the affirmative;

(ii) the second question — in the affirmative;

(iii) the third question — in the negative; and

(iv) the fourth question — since our answer to question (iii) is in the negative, there is no necessity to answer this question.

CONCLUSION

[80] We have given anxious consideration to the submission advanced on behalf of the appellant. We are, however, not persuaded that the High Court and the majority had committed appealable error warranting appellate interference. Accordingly, the appeals are dismissed with costs of RM25,000 for each appeal to the respondent. Costs are subject to the payment of allocator fees. The deposits to be refunded.

[81] In the result, the decision of the High Court and the majority are affirmed.

[82] This judgment is prepared pursuant to s 78(1) of the Courts of Judicature Act 1964, as Justice Zainun Ali and Justice Balia Yusof Haji Wahi had since retired.

Appeals dismissed; decision of High Court and Court of Appeal affirmed.

Reported by Ahmad Ismail Illman Mohd Razali